Mississippi College Law Review

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Attorney General Opinions

Bill Allain

ATTORNEY GENERAL'S OPINIONS

The Authority To Issue An Attorney General's Opinion

The Attorney General of Mississippi is empowered by the law of this state to issue written answers to questions posed by authorized persons. Section 7-5-25, Miss. Code Ann. (1972) sets forth a list of those authorized to request such opinions. In general, the list includes the governor, the legislature, the chancery and circuit court clerks, the secretary of state, the various state departments, state officers and commissioners operating under the laws of this state, the heads and trustees of state institutions, district attorneys, the various county and city officials and their attorneys.

The Attorney General's Opinions function as a protective measure, so that there can be no civil or criminal liability against any person or governmental entity who has properly requested the opinion, setting forth all governing facts on the basis of which the Attorney General's Office has prepared and delivered a legal opinion, and which the requesting party has followed in good faith. This general proposition holds true, unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without substantial support. No opinion shall be given or considered if said opinion is given after suit is filed or prosecution begun.

*Issuance Of An Attorney General's Opinion**

Attorneys in the Attorney General's Office are assigned to specific areas of law in which they specialize. After an opinion request is received by the Office of the Attorney General, it is assigned to the attorney whose area of law it might concern. He then researches the problem and prepares a draft of the opinion or answer. This draft is then submitted to the Opinion Committee which is composed of nine attorneys in the office, including the Attorney General. The Opinion Committee meets twice weekly, on Tuesday and Thursday. At the meeting of the Committee, the draft is discussed and reviewed. The Committee either suggests changes, requests more information, or approves the draft if it is agreed that the analysis of the law is correct.

Should changes be suggested or more information requested, the Committee sends the draft back to the attorney for revision. Upon correction or addition, the draft is returned to the Committee where it is again processed. If there are no further changes, additions, or corrections suggested, the draft will be given final approval and issued as an official Attorney General's Opinion.

*Prepared by Attorney General's Office

OPINION NO. SO 81-02

SUBJECT: THE STATUS OF THE MISSISSIPPI STATE BAR ASSOCIATION. Miss. Code Ann. §§ 73-3-101-171 (1972) created the Mississippi State Bar. The Mississippi Supreme Court in *Mississippi State Bar v. Collins, 214 Miss. 782, 59 So. 2d 351 (1952)* stated that "[t]he State Bar is in reality an agency of the state."

DATE RENDERED: March 12, 1981

REQUESTED BY: Mr. Elbert R. Hilliard, Director, Department of Archives and History

OPINION BY: Bill Allain, Attorney General, by Marvin L. White, Jr., Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Allain has received your opinion request and assigned it to me for research and reply.

Your request states:

> The Department of Archives and History has recently acquired the files and papers of the Mississippi Bar Association. We note that the establishment of this association was mandated by the State Legislature, and further, that in order to practice before the courts of the State an attorney must be a member in good standing of the association.
>
> We would like to have an opinion from your office as to the status of the Mississippi Bar Association. Is it considered an official agency of the State, or is it a private professional organization. The status accorded the association will have a bearing on our handling of the papers we have acquired and will affect the responsibility of the association to abide by State Laws regarding the disposition of its files in the future.

Mississippi Code Annotated, §§ 73-3-101 to 73-3-171 (1972) as amended, created the Mississippi State Bar. This legislation was first enacted by the Legislature in 1932. 1932 Miss. Laws, Ch. 121. The 1932 enactment made all attorneys authorized to practice law, at the time of passage, members of the Mississippi State Bar. The Legislature further required that all persons thereafter admitted to the practice of law in this State be members of the association. This language is now codified as section 73-3-103, Miss. Code Ann. 1972). Prior to 1932 there was no requirement that practicing attorneys be members of a bar association. There was no legislatively created State Bar Association prior to 1932. Presently all attorneys are now required to be members of and pay annual dues to the Mississippi State Bar as a precondition to the continued practice of law. [Section 73-3-119]

Other sections of the Code dealing with the bar association also provide for the officers to be elected and their terms in office [§ 73-3-105], the duties of the secretary and his term in office [§§ 73-3-111 to 113], the location of the association office [§ 73-3-115], the amount of dues to be paid annually by each member [§ 73-3-123], those exempt from dues [§ 73-3-125], and procedures for suspension after failure to

pay dues [§ 73-3-127]. The Code also sets the duties of the officers, how vacancies in these offices are to be filled, how and when board members are to be elected and their duties. [§§ 73-3-129 to 141]. Further, the procedures for investigating and disciplining attorneys is set forth in statutory language. [§§ 73-3-143 to 169].

More importantly the Supreme Court of our State has spoken to this very question. In *Mississippi State Bar v. Collins*, 214 Miss. 782, 59 So. 2d 351 (1952), the Court stated:

> In view of its membership, its functions and the purposes of its creation, the State Bar, created by the act, possesses none of the attributes of a private corporation . . . . The State Bar is in reality an *agency of the state* for the purpose of regulating more effectively the practice of law and for the purpose of encouraging the study of improved methods of procedure and practice in the courts.
>
> (emphasis added) 214 Miss. at 800.

In the case of *In The Matter Of Mississippi State Bar*, 361 So. 2d 503 (Miss. 1978) the Court stated:

> 4) By act of the Legislature, *certain agencies were established*, made available and designated for purposes of assisting this Court in the administration of its exclusive and inherent disciplinary jurisdiction, *which agencies this Court hereby adopts and accepts for that purpose; namely*, as provided by section 73-3-303 Mississippi Code Annotated (Supp. 1977), the *Board of Commissioners of the Bar, including the Bar's Executive Director and the Complaint Counsel, the Bar's Committee on Complaints, and Complaint Tribunals appointed by this Court*.
>
> • • •
>
> 6) However, *the Board is an agency of this Court* for disciplinary purposes, and when it acts within that agency, it acts for this Court in a function separate and distinct from that of the governing body of the Bar.
>
> 7) *As an agency of this Court*, the Board authorized, empowered and directed the President of the Bar to petition this Court for the relief as requested and above set out.
>
> (emphasis added) 361 So. 2d at 505.

These cases clearly state and the statute clearly indicate that the Mississippi State Bar is a state agency. Therefore, the files and papers of the State Bar acquired by the Department of Archives and History should be handled and disposed of as those of any other State agency. The Department should employ the applicable statutes and regulations governing the maintaining and disposition of the State Bar's files in the future.

If this office can be of further assistance to you, please do not hesitate to contact us.

Sincerely,
BILL ALLAIN, ATTORNEY GENERAL

BY:
Marvin L. White, Jr.
Special Assistant Attorney General

MLW/mb

OPINION NO. SO 81-05

SUBJECT: CRITERIA FOR THE REDUCTION OF TEACHING PERSONNEL BY A SCHOOL BOARD. Seniority may be used but it need not be the sole criterion. Qualifications to teach in subject areas may also be used and the final determination is an administrative decision. *See Davis v. Winters Independent School District*, 359 F. Supp. 1065 (N.D. Tex. 1973), *aff'd* 494 F.2d 691 (5th Cir. 1974).

DATE RENDERED: March 24, 1981

REQUESTED BY: Mr. Arthur E. Bingham

OPINION BY: Bill Allain, Attorney General, by Susan L. Runnels, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Allain has received your letter of request dated March 20, 1981, and has assigned it to me for research and reply. Your inquiry states as follows:

> I am a member of the Jefferson County School Board, Fayette, Mississippi, and I am writing for some information from your office.
>
> We as board members would like to know if it is lawful to use *tenure* or *seniority* in cutting teacher personnel.
>
> You are aware of the fact that cutting is a problem, but we want to do it in the right way. We would appreciate this information as soon as we can get it.

It is the opinion of this office that seniority could be used as a criterion in reducing the number of teacher personnel. However, this need not be the sole criterion. In *Davis v. Winters Independent School District*, 359 F. Supp. 1065 (N.D. Tex. 1973), *aff'd.* 494 F.2d 691 (5th Cir. 1974), a teacher's non-renewal was upheld pursuant to a reduction in force although other teachers who remained on the staff had less seniority. The criterion for non-renewal in that case was based on qualifications to teach in subject areas. Other courts have also indicated teachers need not be terminated according to seniority. See *Black v. Joint School District*, 14 Wash. App. 183, 535 P.2d 135 (1975); and

South Kitsap School District No. 402, 8 Wash. App. 809, 509 P.2d 67 (1973).

Generally, in the absence of court ordered desegregation, when a reduction in force is necessary, the choice of which teachers should be retained is an administrative decision for a school board. *Jordhal v. Independent School District No. 129*, 302 Minn. 286, 225 N.W. 2d 224 (1974). Accordingly, a school board should develop its own criteria for reduction in force and apply it uniformly.

If this office can be of benefit in the future, please do not hesitate to contact us.

Sincerely,
BILL ALLAIN, ATTORNEY GENERAL

BY: 

Susan L. Runnels
Special Assistant Attorney General

SLR:hs

OPINION NO. SO 81-01

SUBJECT: THE RIGHTS OF NON-CUSTODY PARENTS TO GAIN ACCESS TO THEIR CHILD'S STUDENT RECORDS. While a student's records are not open to the public, parents whether they have custody or not, do have a right to the records pursuant to 20 U.S.C. § 1232(g).

DATE RENDERED: February 9, 1981

REQUESTED BY: Dr. J. D. Prince

OPINION BY: Bill Allain, Attorney General, by Susan L. Runnels, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Allain has received your letter of request dated January 19, 1981, and has assigned it to me for research and reply. Your inquiry states as follows:

> There are instances where divorce courts grant custody of the children to one parent. We recognize that custody refers to the physical possession of the child by one parent excluding the other. Often times parents with custody want to keep the other parent cut off from information about the children. We face a problem in that federal records specifically instruct us to allow "parents" to have access to the school records of their children. The definition of "parent" does not indicate whether or not the parent has or does not have custody.
>
> Our specific question is, "If a non-custody parent asks to receive copies of student's report cards or requests to look at the cumulative record folder or desires to obtain other information relating to the child's academic progress, are we permitted to provide such records for

the non-custody parent in the absence of a court order specifically restricting us from showing such records to the non-custody parent?

The Family Educational Rights and Privacy Act of 1974 found at 20 U.S.C. § 1232(g) makes no distinction between custody and non-custody parents. Therefore, if a non-custody parent requests information concerning his child's records, the school district would be permitted to provide such records in the absence of a court order terminating this parental right.

If this office can be of benefit in the future, please do not hesitate to contact us.

Sincerely,
BILL ALLAIN, ATTORNEY GENERAL

BY: Susan L. Runnels

Susan L. Runnels
Special Assistant Attorney General

SLR:hs

OPINION NO. SO 81-04

SUBJECT: THE NEED TO CITE AN ADDITIONAL VIOLATION WITH A DUI CHARGE. A valid DWI or DUI citation "is not dependent upon the defendant being charged with additional or other traffic offenses."

DATE RENDERED: February 5, 1981

REQUESTED BY: Hon. Eugene D. Brown, Jr.

OPINION BY: Bill Allain, Attorney General, by Ryan Hood, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

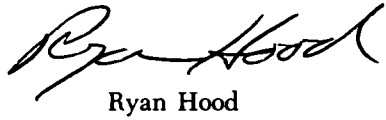
Attorney General Bill Allain has received your letter of February 3, 1981, and has assigned it to the undersigned for research and reply. In your letter you state:

> Re: Interpretation of Miss. Code Ann. § 63-11-5
>
> I am the City Prosecuting Attorney for Holly Springs, and a question has recently arisen regarding interpretation of the above-referenced statute. Accordingly, I would certainly appreciate your staff rendering an interpretive opinion of that portion of the above referenced statute which provides:
>
> Any person who operates a motor vehicle . . . shall be deemed to have given his consent . . . to a chemical test . . . *if lawfully arrested for any offense arising out of acts alleged to have been committed* while the person was driving a motor vehicle . . . (Emphasis added)
>
> Specifically, defense counsel here has asserted that in order for a D.U.I. or D.W.I. citation to be valid, the defendant must also have been

cited for some other offense; otherwise, the argument goes, the implied consent provision is never activated.

It is the opinion of this office, predicated upon Section 63-11-5 of the Mississippi Code, 1972, that a valid D.U.I. or D.W.I. citation is not dependent upon the defendant being charged with additional or other traffic offenses.

Very truly yours,
BILL ALLAIN, ATTORNEY GENERAL

BY: 

Ryan Hood
Special Assistant Attorney General

RH:cm

OPINION NO. SO 80-05

SUBJECT: PAROLE BOARD PROCEDURE. If a prisoner is eligible for parole, but has not paid his fine, he may be released on parole unless the sentencing court finds that the prisoner is financially able to pay the fine. The Parole Board and the Division of Community Services of the Department of Corrections have sole authority over the granting of parole and the parolees. Therefore, "there is no legal obligation by the Parole Board to notify any county officials of an inmate's pending release."

DATE RENDERED: November 26, 1980

REQUESTED BY: Mr. Charles J. Jackson

OPINION BY: Bill Allain, Attorney General, by Robert L. Gibbs, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of request dated November 4, 1980, and has assigned it to the undersigned for research and reply. In your letter, you state the following:

> During my tenure in office, we have had several cases where the sentence imposed consisted of a certain term of years, plus a certain monetary fine - that is, as an example, "Five (5) Years, and $15,000 Fine."
>
> My questions are as follows:
>
> 1) If an inmate is otherwise elegible for parole, can he be kept confined simply because he cannot pay the assessed fine?
> 2) What obligation does the Parole Board have to notify county officials of inmate's impending release?
> 3) Who should be notified?
> 4) What information should such notice contain?
> 5) Should a response to such notice be received before release of inmate?

In answering your first question, § 99-19-20 should be read, particularly § 99-19-20(2). This part reads as follows:

> (2) The defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations hereinafter set out. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.

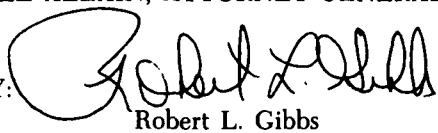
The United States Supreme Court has also held that the Constitution prohibits a state from imposing a fine as a sentence and then converting it into a jail term because the defendant is unable to pay the fine. *Tate v. Short*, 401 U.S. 395, 28 L.Ed. 2d 130, 91 S.Ct. 668 (1971).

It is, therefore, the opinion of this office that an offender cannot be confined simply because the defendant is financially unable to pay a fine. This would apply also if an offender was eligible for parole. Nevertheless, the final decision that determines whether an offender is financially able to pay a fine is that of the sentencing court. And if the court finds that an offender is financially able to pay a fine, the offender may be incarcerated, subject to the limitations set out in § 99-19-20(2)(a)(b) and (c). This is also true if at the completion of the jail or prison term the prisoner claims indigency.

The answer to your second question is found in § 47-7-1 *et seq.* Section 47-7-17 states: "Every offender while on parole shall remain in the legal custody of the Department of Corrections from which he was released and shall be amenable to the orders of the board." Section 47-7-5 gives the Parole Board the exclusive responsibility for granting parole and the exclusive authority for revoking parole. Once an offender is paroled, § 47-7-9 directs the division of community services to supervise the parolee released under their supervision, to stay informed about the conduct and conditions of the parolee, and to keep detailed records and make reports as the court or the Parole Board may require. Section 47-7-27 authorizes the Parole Board, in its discretion, to issue a warrant for the return of a paroled offender upon a showing of probable violation of parole.

Therefore, since the granting of parole and the revocation of parole is granted exclusively to the Parole Board and the supervision of the parolee is provided exclusively by staff personnel of the Division of Community Services of the Department of Corrections, there is no legal obligation by the Parole Board to notify any county officials of an inmate's pending release on parole.

Respectfully,
BILL ALLAIN, ATTORNEY GENERAL

BY: 
Robert L. Gibbs
Special Assistant Attorney General

RLG:sac

OPINION NO. CR 81-02

SUBJECT: THE AUTHORITY OF A JUSTICE COURT JUDGE TO ISSUE A SEARCH WARRANT IS VALID WITHIN THE ENTIRE COUNTY. A Justice Court Judge has coextensive jurisdiction with the other district judges within his county. Therefore, a judge in one district may properly issue a search warrant for controlled substances which are to be found in another district. *See Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924).

DATE RENDERED: March 17, 1981

REQUESTED BY: Hon. Kellis Madison

OPINION BY: Bill Allain, Attorney General, by Ryan Hood, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of March 11, 1981, and has assigned it to the undersigned for research and reply. In your letter you state:

> I am the City Prosecuting Attorney for the City of Pearl, Mississippi and in that capacity I am requesting an opinion from your office concerning the following matter:
>
> Section 41-29-157 of the Mississippi Code of 1972, Annotated, as amended, details the procedure for the issuance of search warrants regarding controlled substances. In that regard, my question is:
>
> Does a justice court judge have the judicial authority to issue a warrant from his jurisdiction to another justice court district wherein the premises to be searched is located?

In response to your inquiry, please find enclosed a copy of *Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924) in which the court cited, with approval, the following language:

> As conservators of the peace, with jurisdiction coextensive with the county by the express provision of this statute, it is made the duty of any justice of the peace of the county to issue the search warrant when a proper affidavit therefor is lodged with him, and under this section a

justice of the peace may issue a warrant to be served in any part of his county.

Very truly yours,
BILL ALLAIN, ATTORNEY GENERAL

BY: 
Ryan Hood
Special Assistant Attorney General

RH:cm
Encl.

OPINION NO. CV 80-16

SUBJECT: WHAT FORMS MAY A REAL ESTATE BROKER USE WHICH WILL NOT CONSTITUTE THE PRACTICE OF LAW? The forms which a broker may use are those specifically allowed in Miss. Code Ann. § 73-35-21 (1972), which include an earnest money contract and other standard legal forms which have been approved by the bar association and the real estate board.

DATE RENDERED: September 30, 1980

REQUESTED BY: Mr. J. Daniel Schroeder, Administrator

OPINION BY: Bill Allain, Attorney General, by Stephen J. Kirchmayr, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain is in receipt of your letter of inquiry and has assigned it to me for research and reply. Your inquiry concerns the utilization of documents fixing and defining the legal rights of parties to real estate transactions as contemplated by Section 73-35-21, Mississippi Code of 1972, by real estate brokers. Due to the length of your inquiry, we are attaching hereto and incorporating herein, a true and correct copy of your request.

Section 73-35-21, Mississippi Code of 1972, provides *inter alia:*

> . . . No real estate broker shall practice law or give legal advice directly or indirectly, unless said broker be a duly licensed attorney under the laws of this state. He shall not act as a public conveyancer nor give advice or opinions as to the legal effect of instruments, nor give opinions concerning the validity of title to real estate, nor shall he prevent or discourage any party to a real estate transaction from employing the services of an attorney; *nor shall a broker undertake to prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as a broker, said broker may use an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal form used by the broker in transacting such business, shall first have been approved*

and promulgated for such use by the bar association and the real estate board in the locality where the forms are to be used. A real estate broker shall not participate in attorney's fees, unless said broker be a duly licensed attorney under the laws of this state and performs legal services in addition to brokerage services.

The above quoted statute clearly indicates the specific intent of the legislature to prohibit anyone who is not a member of the bar of the State of Mississippi from engaging in the practice of law. This prohibition "is not for the protection of the lawyer against the lay competition, but is for the protection of the public". *Darby v. Mississippi State Board of Bar Admissions*, 185 So. 2d 684, 687 (Miss. 1966). It also should be noted that "the courts have inherent authority, independent of statute, to decide what acts constitute the practice of law". *Darby*, supra, at 688.

A broker, pursuant to Section 73-35-21 is precluded from *preparing* documents, fixing and defining the legal rights of the parties to a transaction. The word "prepare" generally connotes "to provide with necessary means; to make ready; to provide with what is appropriate or necessary". *Brennan v. Northern Electric Company*, 72 Mont. 35, 231 P. 388, 389. Also see *Black's Law Dictionary*, Revised Fourth Edition, 1968, P. 1344.

Accordingly, this language, standing alone prohibits a broker from personally preparing any document that fixes and defines the legal rights of the parties to a real estate transaction. "The practice of law includes the drafting or *selection* of documents, the giving of advice in regard to them, and the using of an informed or trained discretion in the drafting of documents to meet the needs of the person being served. So *any exercise* of intelligent choice in advising another of his legal rights and duties brings the activity within the practice of the legal profession." *Darby, supra*, at 687.

The legislature in Section 73-35-21, however, authorizes a broker to utilize (1) "an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction"; and (2) "any other standard legal form used by the broker in transacting such business". *ONLY* if such forms "have been approved and promulgated for such use by the bar association and the real estate board in the locality where the forms are to be used."

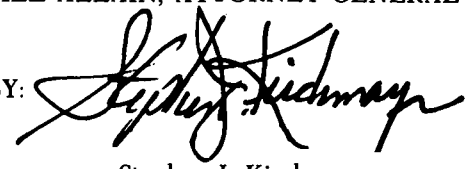
It, therefore, is the opinion of this office that a real estate broker may provide and ultimately utilize forms in the transactions specifically allowed in Section 73-35-21 when such forms have been approved and promulgated by the local bar association and real estate board. Failure on the part of a broker to follow exactly the statutory language of Section 73-35-21 could result in violation of the same, since, the

courts have the authority, independent of any statute, to decide what acts constitute the practice of law.

Trusting this responds to your inquiry, I am

Yours very truly,

BILL ALLAIN, ATTORNEY GENERAL

BY: 

Stephen J. Kirchmayr
Special Assistant Attorney General

SJK/mg

OPINION NO. CV 81-01

SUBJECT: WHO MAY OBTAIN COPIES OF FINAL DECREES OF ADOPTION? According to Miss. Code Ann. §§ 93-17-25, 31 (1972), all proceedings are to be confidential. However, "officers of the court, including attorneys, shall be given access to such records upon request."

DATE RENDERED: March 23, 1981

REQUESTED BY: Mr. Gerald W. Bond

OPINION BY: Bill Allain, Attorney General, by Richard M. Allen, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your opinion request dated March 19, 1981, and has assigned it to me for research and reply, your letter of request stating:

> Recently we have had numerous requests for copies of Final Decrees of Adoptions. This office was under the opinion that Final Decrees, once signed by the Chancellor, and after all copies made at that time, the file became a closed file. After that time, copies could be made only by court order to protect confidentiality. We were citing Mississippi 1972 Code Annotated Sections 9-5-169 and 93-17-25 as reference. Could you verify this practice as being either correct or incorrect and cite the correct section for us?

Sections 93-17-25, 31, Mississippi Code of 1972, take adoption records out of the public records category indicated by Section 9-5-169, *ibid*, copies of which referenced statutes are attached hereto for handy reference.

Your office advised by telephone that many different people would make requests for copies of final decrees of adoption, that some attorneys just send clients over to pick such copies up, etc.

The only persons or parties who may obtain copies, certified or un-

certified, of adoption proceedings completed subsequent to July 1, 1955, are those set forth in said Sections 93-17-25, 31.

Also, access to the records by "officers of the court, including attorneys" does not include their procuring copies, for which copies an order of the court would be necessary.

Yours very truly,
BILL ALLAIN, ATTORNEY GENERAL

BY: Richard M. Allen

Richard M. Allen
Special Assistant Attorney General

RMA:hs
Attachments

OPINION NO. CR 81-01

SUBJECT: BAIL MAY BE DENIED FOR PERSONS CONVICTED OF CERTAIN SPECIFIED FELONIES. Pursuant to Miss. Code Ann. § 99-35-115 (1972), "[a] person convicted of murder, rape, arson, burglary or robbery shall not be entitled to be released from imprisonment pending an appeal to the supreme court", unless ordered to do so by the supreme court, the trial judge or a judge from the district wherein the person was convicted.

DATE RENDERED: March 31, 1981

REQUESTED BY: Sheriff Dolph Bryan

OPINION BY: Bill Allain, Attorney General, by Ryan Hood, Special Assistant Attorney General.

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of March 20, 1981, and has assigned it to the undersigned for research and reply. In your letter you state:

> The question that I would like an answer to concerns Circuit Court. After conviction by jury trial in Circuit Court, and the person convicted appeals to State Supreme Court.
>
> Are there some offenses where the Circuit Judge can deny the person convicted of an appeal bond, and order the convicted person to start serving his sentence pending appeal?

In response to your letter your attention is respectfully invited to Section 99-35-115 of the Mississippi Code, 1972, a copy of which is enclosed.

Very truly yours,
BILL ALLAIN, ATTORNEY GENERAL

BY: 
Ryan Hood
Special Assistant Attorney General

RH:cm
Encl.

OPINION NO. SO 81-03

SUBJECT: WHAT IS THE PROPER PROCEDURE FOR GARNISHMENTS? The Mississippi Supreme Court in *Leasy v. Zollicofer, et al., 389 So. 2d 1378 (1980)* interpreted Miss. Code Ann. § 85-3-1 (1972) to mean that a writ of garnishment is only good until the next return day of the next term of court which issued it. This, coupled with the 30 day "grace" period, makes "garnishment procedures practicably and virtually unavailable and unavailing to a judgment creditor."

DATE RENDERED: December 18, 1980

REQUESTED BY: Mr. Robert L. Taylor

OPINION BY: Bill Allain, Attorney General, by Richard M. Allen, Special Assistant Attorney General

"Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your opinion request dated November 3, 1980, and has assigned it to me for research and reply, your letter of request stating (in its entirety).

> "In light of all the confusion concerning the withholding of garnishments by the Chancery Clerk's office for county employees, please advise as to what we should do."

The Supreme Court handed down its final ruling in *Leasy v. Zollicofer, et al.,* December 4, 1980, a copy of which I attach. Theretofore, the language in Section 85-3-1, Mississippi Code of 1972, to the effect that the set percentage of "salary, wages or other compensation" should be retained by the garnishee-defendant "for such period of time as it is necessary to accumulate a sum equal to the amount shown as due the court on the writ or levy, at which time the garnishee shall pay the same into court" had been construed as authorizing a judgment creditor to have the clerk issue a writ of garnishment which would be good from term to term until the judgment was paid or the employment terminated.

However, the court in its *Leasy* opinion said otherwise and that the writ was good only until the return date of the next term of court which issued it, that this was true even though the 1980 Legislature,

by amending Section 85-3-1(10)(a), gave the judgment debtor 30 days of "grace" from the service of the writ and in the face of the above-quoted statutory language. In its second opinion, the Court held firm on its original opinion stating that the 30 days' grace allowance came from a law not in existence at the time of the trial of the original case and that if the Legislature had intended to change the existing law, "it would have been a simple thing for them to have done so by appropriate language or to have stated that such was their purpose."

The return-day of a term of court is the first of the term (or Rule Day in Chancery) to which the process is returnable, and I know of no authority to make process returnable other than to the next term of court (or to a Rule Day on Vacation Day in Chancery). See Section 13-3-11 and -13, ibid. Terms of court are fixed by statute in the case of chancery, circuit and county court and by the justice court judge within the statutory postscription of Section 9-11-15, ibid.

To sum up, under the *Leasy* case, there can be no withholding of salary past the return-day of the term to which the writ is made returnable, which means the next term of the particular court and not even that until the 30 days has elapsed. Therefore, the *Leasy* case makes salary and wages garnishment procedures practicably and virtually unavailable and unavailing to a judgment creditor in justice or county courts and of extremely limited application in other courts.

If the Legislature wishes to change the law as set out in the Supreme Court opinion, the Supreme Court has given its direction.

Yours very truly,
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